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Robert E. Charney

Daniel Guttman

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Is Money No Object: Can the Government Rely on Financial Considerations Under Charter Section 1 ?

Robert E. Charney[*]
Daniel Guttman[**]

> It is not the abolition of public schools, but it is their increase, at enormous cost, that is likely to trouble future generations, as it does some of them who are of the present generation.
> — Meredith C.J.C.P. in *Ottawa Separate School Trustees v. City of Ottawa.*[1]

I. GOVERNMENT BENEFITS: AN INTRODUCTION

In recent years a vast array of government programs have been challenged as being inconsistent with the *Canadian Charter of Rights and Freedoms*.[2] A common ground of attack is that a specific benefit program offered is under-inclusive in that it is extended inappropriately to a limited number of beneficiaries. An alternative ground often advanced is that the benefit granted by the program is set at an insufficient level. Thus, the question of whether governments should be able to rely on funding considerations to justify under-inclusive programs that give rise

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[*] General Counsel, Constitutional Law Branch, Ontario Ministry of the Attorney General.

[**] Counsel, Constitutional Law Branch, Ontario Ministry of the Attorney General. The views expressed in this article are the authors', and do not purport to represent the position of the Ministry except where indicated. Bruce Ellis, an articling student at the Constitutional Law Branch, assisted in the preparation of this paper.

[1] (1915), 24 D.L.R. 497, at 503 (*per* Meredith C.J.C.P.).

[2] Being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

to discrimination under the Charter is a question of fundamental importance.

This paper explores the important question of to what extent the Charter and courts should determine how government allocates finite resources in a world of infinite need. Every service the government offers could be improved and expanded if additional resources could be added. It is no surprise when every government commission or committee investigating discrete services like health, education, environment, social services and justice recommends that additional resources be provided to improve the particular service being considered. But the obvious reality is that governments have limited budgets to work with and face very difficult decisions in determining budget allocations. The courts are not responsible for allocating government resources. However, they are continually faced with arguments from applicants that a specific program or group of beneficiaries is entitled to a greater share of government resources. Thus, courts are often called upon to consider a government argument that budgetary restraints justify a limit or alleged deficiency in the benefit program offered.

In this paper, we first consider the recent case of *Nova Scotia (Workers' Compensation Board) v. Martin*,[3] where the government of Nova Scotia attempted to rely on financial considerations in its section 1 analysis. A reading of this case makes it apparent that the Supreme Court has left open the question of whether and to what extent governments seeking to justify under section 1 programs found to infringe the Charter can and should be able to rely on budgetary and other financial considerations. As explained in this paper the answer will depend upon the future direction taken by the Court in its section 15 analysis. Clearly, budgetary considerations "in and of themselves" should not be permitted to justify classic cases of direct discrimination. No one would suggest, for example, that the government could justify the provision of financial benefits exclusively to men on the sole ground that it would cost too much to extend an equal benefit to women. As long as section 15 is limited to cases where the government makes the initial decision of whether to provide the benefit at all, and, if so, the value or quantum of the benefit to be provided, the government must be obliged to divide the pie equally. This means that judicial orders to expand a benefit program

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[3] [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54 [hereinafter "*Martin*"].

may be satisfied by simply redividing the pie; the government must be free to reduce the level of the benefit in order to distribute it more broadly within the same limited budget.

If, however, section 15 is interpreted more broadly so as to impose a positive obligation on government to establish benefit programs or a certain level of benefit in order to reduce or eradicate existing social or economic inequalities, then fiscal limits must be a legitimate government consideration. Courts can redivide the pie, but they cannot make it bigger.

The first part of this paper summarizes and explores the Court's decision in *Martin*.[4] We then consider the question of the place of financial considerations in the section 1 analysis. After briefly examining the approach courts have traditionally taken in non-constitutional cases when asked to review government decisions involving budget allocation, we examine whether this is consistent with the relevance courts have given to financial considerations in the section 1 analysis.

II. *NOVA SCOTIA (WORKERS' COMPENSATION BOARD) V. MARTIN*

In *Martin*,[5] the Supreme Court had the opportunity to clarify its position regarding whether financial considerations could justify a violation of section 15 of the Charter. However, the Court found it unnecessary to resolve this important question in this case because it found that the evidence did not demonstrate that the infringement was compelled by financial considerations. No doubt, the Court was also focused on the other important issues raised in *Martin*, which we examine below.

In *Martin*, the applicants, who both suffered from chronic pain caused by work-related injuries, challenged the exclusion of chronic pain from the regular workers' compensation system. In lieu of the benefits normally available under the scheme, injured workers suffering from chronic pain received only a four-week Restoration Program. The applicants argued that this exclusion infringed their section 15 rights and that the infringement was not justified under section 1. However, before they could argue the substantive Charter violation, they had to first

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[4] *Id.*
[5] *Id.*

address the argument of whether the Workers' Compensations Appeal Tribunal had jurisdiction to even apply the Charter.

1. Jurisdiction of Administrative Tribunals to Apply the Charter

Thus, the first issue addressed by the Supreme Court was how to determine whether administrative tribunals have jurisdiction to apply the Charter. In conjunction with *Paul v. British Columbia (Forest Appeals Commission)*[6] released concurrently with *Martin* on October 3, 2003, *Martin* set a revised and expansive test for determining the constitutional jurisdiction of administrative tribunals. The test established by the Court is now that a tribunal that has been granted the power to determine questions of law — either expressly in its enabling statute or by implication — may determine constitutional issues, including both Charter and aboriginal rights issues, unless there is a clear implication from the statutory scheme to the contrary.

The Court held that administrative tribunals which have either the expressed or implied jurisdiction to consider questions of law arising under a challenged provision will be presumed to have the jurisdiction to consider whether that provision infringes the Charter. That presumption will only be rebutted if the legislature has removed jurisdiction from the tribunal to consider Charter issues. The party challenging the jurisdiction of the tribunal to consider constitutional issues has the burden of demonstrating that the legislature intended to remove that jurisdiction, either explicitly or implicitly.

The Court gave three reasons to support its conclusion that tribunals with the power to decide questions of law should be presumed to have the jurisdiction to apply the Charter. First, the principle of constitutional supremacy in section 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into account the supreme law

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[6] [2003] 2 S.C.R. 585, [2003] S.C.J. No. 34 [hereinafter "*Paul*"]. In *Paul*, the Supreme Court also came to the important determination that the constitutional division of powers does not preclude a provincial government from investing in a provincial tribunal the jurisdiction to adjudicate issues of aboriginal rights that arise incidentally to a tribunal's regulation of a provincial matter. The Court also established that the test to determine whether a provincial tribunal has jurisdiction to decide aboriginal rights issues is the same as the jurisdiction to consider Charter issues.

of the land. Thus, the power to decide a question of law is the power to decide by applying valid laws only.

Second, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court. Finally, allowing tribunals to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the Charter are subject to judicial review on a correctness standard and a tribunal's decision that a provision of its enabling statute is invalid is not binding on future decision makers.

The Court's ruling on the jurisdiction of administrative tribunals to apply the Charter clarifies confusion that remained from its analysis in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[7] and *Cooper v. Canada (Human Rights Commission)*.[8] However, with the new test, the Court has vastly expanded the number of tribunals that will have jurisdiction to consider the Charter. One issue which remains outstanding is when there are parallel proceedings in a tribunal and a court, under what circumstances should the tribunal stay its proceedings to defer to the court process.

The test enunciated in *Martin* and *Paul* establishes a broad jurisdiction for tribunals to consider constitutional issues. This obviously has important implications for government. As stated in *Paul*, the issue of tribunals' jurisdiction to consider the Constitution, including aboriginal rights, is of "great significance both to aboriginal persons and to provincial governments, which enable administrative tribunals to address a vast diversity of issues that may encompass s. 35 rights."[9]

The judgments send a clear message that if governments do not want a tribunal which has the power to consider questions of law to consider Charter or aboriginal rights challenges, it should say so explicitly in the tribunal's enabling statute. However, in *Martin* and *Paul*, the Supreme Court has clearly stated its preference that administrative tribunals which have the power to determine issues of law should have the authority to determine constitutional issues. While the Court suggested

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7 [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42.
8 [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115.
9 *Paul*, *supra*, note 6, at para. 2.

that the question is ultimately one for the legislature to decide, in *Martin,* the Court included the following warning:

> I refrain, however, from expressing any opinion as to the constitutionality of a provision that would place procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims.[10]

Further, the Court stated that Canadians "should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts."[11] The Court also stated that the accessibility concern was particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer Charter issues to courts would result in costly and time-consuming bifurcation of proceedings. The Court's decision on this point has the benefit of clarifying an area of procedure that was beset with convoluted and confusing tests which resulted in procedural uncertainty and were often more difficult to apply than the Charter itself.

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[10] *Martin*, *supra*, note 3, at para. 44, *per* Gonthier J. This paragraph raises the question of whether there exists a right to "an effective alternative administrative remedy for Charter claims", a far cry from the earlier suggestion of former Chief Justice Lamer in *Cooper v. Canada (Human Rights Commission)* that even permitting tribunals to adjudicate Charter claims could be a violation of the constitutional doctrine of separation of powers [[1996] 3 S.C.R. 854, at para. 28, [1996] S.C.J. No. 115]. If there is a right to "effective alternative" remedies, it is unclear where in the Charter's text such a right is found, or, given the right to vindicate Charter rights in Court, why an "alternative" forum is necessary. It also ignores the important fact that the legislature which establishes the tribunal and its jurisdiction is in the best position to determine whether the particular tribunal has the expertise to make a useful contribution to the Charter analysis. While the Charter may not be, in the words of McLachlin C.J., a "holy grail which only judicial initiates of the superior courts may touch" [*Cooper*, *id*., at para. 70, *per* McLachlin J. (as she then was), dissenting], the policy issues which must be considered under the Charter are often more complex and far reaching than the kinds of decisions many tribunals are given the jurisdiction to make.

[11] *Martin*, *supra*, note 3, at para. 29.

2. The Section 15 Issue

Following its decision on the jurisdictional issue, the Court considered the merits of the Charter claim. It found that the exclusion of chronic pain from the regular compensation scheme in the legislation at issue infringed the equality guarantee in section 15 of the Charter, finding that the test set out in *Law v. Canada (Minister of Employment and Immigration)*[12] for section 15 claims was satisfied. By entirely excluding chronic pain from the general compensation provisions, the legislation at issue imposed differential treatment upon workers suffering from chronic pain on the basis of the nature of their physical disability. Further, the second branch of the *Law* test was satisfied as physical disability was an enumerated ground in section 15. Finally, this differential treatment was discriminatory because it did not correspond to the actual needs and circumstances of injured workers suffering from chronic pain. Injured workers suffering from chronic pain were deprived of any individual assessment of their needs and circumstances and the scheme ignored completely the needs of those workers who, despite treatment, remained permanently disabled from chronic pain.

3. The Court's Section 1 Analysis

The Court concluded that the violation of section 15 was not justified under section 1 of the Charter. The government advanced four principal objectives, two of which were closely related as they pertained to financial considerations. The first stated objective was to maintain the financial viability of the Accident Fund, which was not guaranteed because of the Fund's considerable accumulated liability. The second was to avoid potential fraudulent claims based on chronic pain, which would be difficult to detect since no objective findings are available to support chronic pain claims.[13]

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[12] [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

[13] Closely tied to this objective was the need to develop a consistent legislative response to the administrative challenges raised by processing chronic pain claims. The final objective was to implement early medical intervention and return to work as the optimal treatment for chronic pain or as bluntly put by the Attorney General of Nova Scotia "to eradicate the dependency on benefits and to motivate return to the workforce" [AGNS *factum* at para. 148; cited by Gonthier J. in *Martin*, *supra*, note 3, at para. 108].

The Court dismissed the first objective swiftly. The Court stated:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 281; see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see *Eldridge, supra*, at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the challenged legislation to be supported by another, non-financial purpose, budgetary considerations may become relevant to the minimal impairment test: see *P.E.I. Reference*, at para. 283. But at the present stage of the analysis, such a non-financial purpose remains to be identified.[14]

The Court moved on to find that the objective of avoiding fraudulent claims based on chronic pain was the strongest objective advanced by the government since avoiding such claims would ensure that the resources of the scheme would be properly directed to workers who are genuinely unable to work by reason of work-related accident. While developing a consistent legislative response to the special issues raised by chronic pain claims, such as developing a scheme that avoided fraudulent claims, was pressing and substantial, the blanket exclusion of chronic pain from the regular compensation scheme did not minimally impair the rights of chronic pain sufferers. Further, the deleterious effects of the challenged provisions clearly outweighed their beneficial effects. Since the last two branches of the *Oakes*[15] proportionality test were not satisfied, the violation could not be justified under Charter section 1.

The Court obviously did not feel it necessary to examine in detail the important issue of the place of financial considerations in the section

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[14] *Martin*, *supra*, note 3, at para. 109.

[15] *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7.

1 analysis. The Court relied on *Schachter*[16] and the *Judges' Reference*[17] for the rule that "[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter."[18] However, the Court formulated this rule at the same time that it acknowledged the suggestion "that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective."[19] In our view, the decision of whether financial considerations can be a free-standing objective is an extremely important decision that will have a profound effect on government decision-making. The Court's decision not to address this question in detail appears to be based on the finding that it was unnecessary to decide the point for the purposes of the case at bar since on the record there was no evidence to suggest that the chronic pain claims in and of themselves threatened the viability of the Accident Fund. In the rest of this paper, we wade into this question, to determine whether and to what extent governments should be able to rely on money as an object in the section 1 analysis.

III. The Traditional Approach to the Review of Government Funding Decisions

Courts have traditionally recognized that government funding decisions are beyond the scope of judicial review. Accordingly, funding and resourcing decisions involving public funds have been classified as classic "policy" decisions which do not give rise to any cause of action.

In tort law, the Supreme Court of Canada has distinguished between "policy" decisions, which are immune from tort liability and "operational" matters which are subject to tort liability. In *Just v. British Columbia*, the Court reaffirmed the principle that "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of these decisions."[20]

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[16] *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68.

[17] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75.

[18] *Martin*, *supra*, note 3, at para. 109.

[19] *Martin*, *id.*, citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, [1997] S.C.J. No. 86.

[20] [1989] 2 S.C.R. 1228, at 1239, [1989] S.C.J. No. 121.

According to the Court "true policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors."[21] Similarly, the Court concluded that "as a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions."[22]

In *Brown v. British Columbia (Minister of Transportation and Highways)*[23] the Supreme Court of Canada had to consider whether the Crown's decision to maintain the "summer maintenance" schedule for road repair in November was a policy or operational decision. In finding that it was a policy decision and therefore immune from tort liability, the Court summarized the relevant factors that should be considered in making a determination of distinguishing between "policy" and "operations":

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.[24]

Thus, the fact that government policy takes into account "economic factors" and "will usually be dictated by financial, economic social and political factors or constraints" is no surprise to the courts. Indeed, it would ignore reality to believe that economic or financial constraints are not relevant to the policy process.

Judicial deference to budgetary considerations has also traditionally applied in the administrative law context, where the Supreme Court has recognized that "governments may be moved by any number of political, economic, social or partisan considerations,"[25] and has declined to review executive action on the basis that the Crown was motivated by

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[21] *Id.*, at 1240.
[22] *Id.*, at 1245.
[23] [1994] 1 S.C.R. 420, [1994] S.C.J. No. 20.
[24] *Id.*, at para. 38.
[25] *Thorne's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106, at 112-13. See also *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, [1998] O.J. No. 2132 (C.A.).

financial or budgetary considerations. For example, in *Hamilton-Wentworth (Regional Municipality) v. Ontario (Ministry of Transportation)*,[26] the Divisional Court reviewed the decision of the new government to deny further funding to the development of an expressway project. In rejecting the application for judicial review of the Minister's decision to refuse funding, the Court emphasized that the government had the right to order its fiscal priorities and make funding decisions according to these priorities:

> The evidence leads to the conclusion that the decision was one announced by the Minister after approval of the Cabinet in substance constitutes an expression of the intention of the government not to provide any further funding for construction of the project. The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
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> While it would appear that in basing its decision on environmental concerns the government is ignoring the statutory framework established to deal with environmental matters, that does not affect its jurisdiction to make the decision in question. Such a decision is not subject to judicial review. It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement is within the authority of the legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.
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> …
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> The nature of the action under review here is, in my view, observably and significantly different from those situations where the court requires government, be they municipal or provincial, to carry out mandates according to law and which require the expenditure of money. The decision in issue represents an exercise of the government's right to

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[26] (1991), 2 O.R. (3d) 716 (Div. Ct.); leave to appeal ref'd (1991), 4 Admin. L.R. (2d) 226 (Ont. C.A.) [hereinafter "*Hamilton-Wentworth*"]. See most recently: *Byl, Litigation Guardian v. Ontario* (2003), 67 O.R. (3d) 588, at 600, [2003] O.J. No. 3436 (Div. Ct.).

> allocate its funds as it sees proper. Such a conclusion is essential to the parliamentary system of democracy.[27]

While courts may review executive action to ensure that it is authorized by statute, and to ensure that a statute designated for one purpose is not used for a different purpose,[28] courts cannot review the annual allocation or budget process since this is viewed as a political or policy decision:

> [I]t is not for any court to oversee a Minister of the Crown in policy decisions or in the exercise of his or her discretion in the expenditure of public funds entrusted to his or her department by the legislature. As Grange J. said, "The propriety of the payment or the withholding of payment may in some circumstances be inquired into; the wisdom of the decision can never be the subject of judicial review. It is a political and not a judicial problem".[29]

Another example of a case where a court refused to second guess a government policy decision based on fiscal considerations is *Masse v. Ontario (Ministry of Community and Social Services)*,[30] where the Ontario Divisional Court was asked to consider whether budgetary considerations could justify a 21.6 per cent reduction in social assistance benefits. The first issue was the administrative law question of whether the regulation reducing welfare rates was *intra vires* the provincial social assistance legislation. The applicant argued that the regulation was *ultra vires* because the "sole or overriding considerations were provincial debt and provincial deficit and those considerations excluded any meaningful consideration for the 'persons in need' who are the social assistance recipients."[31] The court was also asked to consider whether the reduction violated sections 7 and 15 of the Charter and if so whether the reduction could be justified under section 1.

The government led evidence to establish that in March 31, 1995 Ontario's debt had risen to $85.7 billion, the debt/gross domestic prod-

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[27] *Id.*, at 731-32.

[28] *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164 (C.A.) and *Multi-Malls Inc. v. (Ontario Minister of Transportation and Communications)* (1976), 14 O.R. (2d) 49 (C.A.).

[29] *Hamilton-Wentworth*, *supra*, note 26, at 733, citing *Metropolitan General Hospital v. Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699, at 705 (H.C.).

[30] (1996), 134 D.L.R. (4th) 20, [1996] O.J. No. 363 (Div. Ct.).

[31] *Id.*, at 36.

uct (GGDP) ratio to over 30 per cent, and the budget deficit in 1994-95 to $10.1 billion.[32] The government's expert, Professor Jack Carr of the Department of Economics at the University of Toronto provided the following evidence:

> Clearly this process of ever increasing deficits and debts cannot go on forever. Government borrowing power ultimately depends on its ability to tax. There is a finite limit to the amount governments can tax; hence there is a finite limit to the amount government can borrow. This finite borrowing limit is known as the debt wall. As a government approaches the debt wall interest rates rise and eventually both foreign and domestic lenders refuse to take any more debt and a debt crisis occurs.[33]

The court rejected the administrative law challenge. The court accepted that "the evidence showed that there are serious problems with the debt level of the Ontario government and serious concern was being expressed by economists with respect to these levels. The credit rating of the Ontario government has been falling and that drastic action to deal with those financial problems is required."[34] The Court accepted that "debt and deficit" played a role in the decision to enact the impugned regulation, but concluded that "fiscal considerations are part and parcel of the policy and objects"[35] of the legislation and their consideration could not render the regulations invalid.

The majority of the court found it unnecessary to consider the importance of funding considerations in the section 1 analysis, concluding that there was no infringement of either section 7 or 15 of the Charter. Justice Corbett agreed with respect to Charter section 7, but dissented on Charter section 15 as the regulation did not exempt the temporarily disabled or sole-support parents of pre-school age children from the general reduction. While she acknowledged that the objectives of the regulation in reducing the levels of social assistance were pressing and substantial she concluded that failure to exempt the temporarily disabled and sole-support parents with pre-school children was not rationally connected to those objectives because those groups were not "employ-

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[32] *Id.*, at 27.
[33] *Id.*
[34] *Id.*, at 54.
[35] *Id.*, at 37.

able" and could not offset the effects of the reduction through employment.[36]

In all of these cases the issue is the perceived adequacy of the funding available to a particular government program or service. But "adequacy" is ultimately a political assessment, not a legal concept, and there are no judicially manageable standards by which a court can determine what level of funding is adequate. The demand for many government services like education and health care is virtually limitless, and the correct answer to this kind of policy question depends more on political or economic philosophy than legal analysis.

Given these principles of tort and administrative law, government budget allocation decisions have been appropriately viewed as political/policy decisions and have generally not attracted judicial interference. The limits of government expenditure, and the incidence of tax burden, which necessarily accompanies government expenditure, have always been seen as matters of political judgment for elected officials and not matters for judges.[37] Courts have therefore been reluctant to adjudicate claims for additional government resources.

IV. SHOULD GOVERNMENTS BE ABLE TO JUSTIFY LIMITS ON SECTION 15 CHARTER RIGHTS ON THE BASIS OF FINANCIAL CONSIDERATIONS?

The section 1 analysis applicable to a limit on legislation conferrring financial benefits requires courts to consider both the purpose for providing the benefit, as well as the purpose for limiting the benefit. The importance of considering both legislative objectives was explained by Bastarache J. in his concurring opinion in *M v. H.*:

> The necessity of this approach also emerges from the particular nature of most social legislation conferring benefits. The reason for this

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[36] *Id.*, at 95.

[37] Similar statements have been made in the context of English administrative law. See for example *R. v. Cambridge Health Authority*, [1995] 2 All E.R. 129, at 137 (C.A.), *per* Sir Thomas Birmingham M.R.:

> Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make.

> approach is clear. The *Oakes* analysis presupposes a tension between the objectives of the *Charter* right and the objectives of the particular legislative provision that is alleged to constitute a violation of the *Charter* guarantee. Only after that tension is identified does it make sense to ask whether that legislative objective is pressing and substantial, and whether the precise means adopted are so closely related and narrowly tailored to that objective as to warrant derogation from the *Charter* guarantee. *If the tension of objectives is removed, then almost any exclusion that detracts from the ambit of the broad legislative goal will fail the s. 1 test, because, simply by virtue of being an exclusion, it cannot be rationally connected with the goal. Only when the specific purpose or objective of the exclusion is articulated are the tests under Oakes … properly engaged.* This is particularly true in cases involving the guarantee of equality. Unlike most legislation which infringes ss. 2(*a*), (*b*), (*d*) and 7 to 14 of the *Charter*, the broad purposes of entitlement-granting legislation will seldom come into conflict with s. 15. Usually, the purposes are perfectly congruent and it is necessary to articulate the purpose of the limitation in order to identify the underlying tension between the legislative purpose and the *Charter*.
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> Another danger in not rigorously following this approach is the tendency to suggest that nothing is taken away from the included class by making others eligible for the benefit. Such a formulation misses the point. The issue under s. 1 is whether the government acted in a reasonable fashion in limiting the class based on one of the prohibited enumerated or analogous characteristics described in s. 15. That requires an analysis of its reasons for limiting the class as it did. *If the government had a valid reason for limiting the class, and it used means which were proportional to this objective, then the limitation on the equality rights of those excluded is justified.* Whether anything is taken away from the included class is entirely irrelevant. The inquiry is not into a possible detriment to the included class. [Emphasis added.][38]

We agree with Bastarache J. that the detriment to the included class was entirely irrelevant in the context of *M. v. H.*[39] Expanding the definition of "spouse" to include gay and lesbian partners could take nothing away from heterosexual spouses because "spousal status" is not a lim-

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[38] [1999] 2 S.C.R. 3, at paras. 333-34, [1999] S.C.J. No. 23. See also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 106, [1995] S.C.J. No. 43.

[39] As stated by Bastarache J., the appropriate inquiry focuses exclusively on whether the government had valid reasons for limiting the included class. The reference to "valid reasons" for a decision to limit the included class may include financial reasons. See *M. v. H.*, *supra*, note 38, at para. 329.

ited resource. However, in some cases expanding benefits to other classes may cause a detriment to the included class. In those cases, the detriment to the included class may prove to be extremely relevant.[40]

Whether "anything is taken away from the included class" will be relevant in those circumstances where the benefit is a limited resource. Take for example a benefit like public housing which has a limited number of units and long waiting lists, or certain medical procedures where the professional expertise is in short supply and long waiting lists result. Expanding the eligible beneficiaries in such cases does not result in an expansion of the available benefits — it results only in the expansion of the waiting list. Any expansion of the waiting list will be to the detriment of the included class because its members will receive their benefit later or perhaps not at all.

If the government objective in this situation is to allocate the limited resource to those most in need, or those who will benefit the most,[41] then (assuming we are into Charter section 1) the detriment to the included class is extremely relevant to the section 1 analysis. Expanding the class of beneficiaries in these circumstances may well defeat or undermine the government's objective. Courts cannot pretend that there are unlimited resources, nor can waiting lists be made to disappear by judicial declaration.

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[40] While the last two sentences of the passage quoted above are open to different interpretation, it is clear to us that read in context, Bastarache J.'s statement that "the inquiry is not into a possible detriment to the included class" was made in reference to the arguments raised in *M. v. H.* and should not be construed as meaning that in a case where the included class is negatively affected, the government cannot rely on that fact.

[41] The principles which may apply to the allocation of scarce resources in the context of health care has engendered a considerable body of literature. Bioethicists debate whether priority should be given to the sickest and most disabled, or to those who may be less sick but are more likely to have better outcomes. Should, for example, government allocate limited health resources to provide an aggregation of modest benefit to larger numbers of people, or more significant benefit to fewer people? These difficult questions are all based on the premise that there are not enough resources to provide unlimited health care to everyone, and government must make macroallocation decisions when it determines the health care budget. Some limits are based on limited human resources (not enough medical specialists), some on limited funds, and some on a shortage of finite resources (*e.g.*, organs for transplant), although these limits are interrelated. See *e.g.*,: N. Daniels, *Just Health Care* (Cambridge: Cambridge University Press, 1985); M. McKneally, B. Dickens, E. Meslin, and P. Singer, "Bioethics for Clinicians: Resource Allocation" (1997) 157 C.M.A.J. 163. See also the Commission on the Future of Health Care in Canada, *Building on Values, The Future of Health Care in Canada*, Final Report, November 2002 (Romanow Commission Report).

It must be emphasized at the outset that every benefit program established by government has at least two objectives: the first, most obvious one is to extend benefits to a group of eligible persons. However, every government program, no matter how deserving the cause may be, has a finite budget which limits the scope and capacity of the program. That fact has become increasingly relevant in view of the modern realities, where the debts of provincial and federal governments have increased steadily in the last 20 years.[42] Thus, the second, less obvious, but equally important objective of benefit programs is to limit the potential costs of the program. Every government benefit program, be it health, education or social services, could undoubtedly be improved or expanded if it had additional funding, but the reality is that governments have finite resources and this necessarily influences the parameters and scope of the final policy.

This latter point was recognized by Bastarache J. in his concurring opinion in *M. v. H.* where he stated:

> The reason for the limitation do not always flow logically from the reasons for inclusion. For example, the scope of many acts granting financial benefits are circumscribed by a government's need to operate within fiscal constraints. Such a concern is usually totally separate and distinct from the reasons for granting a benefit in the first place.[43]

If courts focus only on the purpose for granting the benefit, every limit has the potential to fail the rational basis test in the section 1 analysis. If benefits are good, then more benefits must be even better, and any limit or restriction seems to be inconsistent with the purpose of the benefit. That is why courts must consider the reason for the limitation as part of the section 1 analysis.

In assessing those limits and determining its priorities, the government has the advantage of hearing from a myriad of potential beneficiaries, each with a legitimate, even compelling, argument for a greater share of limited resources. Legislatures must pass an annual budget, and must consider all of these claims in determining whether to expand or establish particular benefit programs. In contrast, courts are presented

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[42] Ontario's debt now exceeds $100 billion. See *Ontario Judges' Association v. Ontario* (2004), 67 O.R. (3d) 641, at 666 (C.A.).

[43] *M. v. H.*, *supra*, note 38, at para. 329.

with only one potential beneficiary or group of beneficiaries, and cannot, therefore, make principled prioritization decisions.[44]

Even in the Charter context the Supreme Court has recognized that it is not in the best position to make the inherently complex policy decisions relating to the allocation of scarce resources in society. For example, in *Irwin Toy v. Quebec (Attorney General)*[45] the Court recognized that governments may set limits based on the allocation of scarce resources and a reasonable evaluation of conflicting scientific research without the courts second-guessing that decision:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.[46]

Another example of this deference to government decisions regarding resource allocation is found in *R. v. Askov*, where the Court stated :

> Wise political decisions will be required with regard to the allocation of scarce funds. Due deference will have to be given to those political decisions, as the provision of courtroom facilities and Crown Attorneys must, for example, be balanced against the provision of health care and highways.[47]

In *Schachter v. Canada*, in the context of its remedial analysis, the Supreme Court recognized that budget constraints are relevant in the determination of a proper remedy:

> Even where extension by reading in can be used to further the legislative objective through the very means the legislature has chosen, to

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[44] For a discussion of this concern in the context of health care, see: D. Greschner and S. Lewis, "*Auton* and Evidence-Based Decision Making: Medicare and the Courts" (2003) 82 Can. Bar Rev. 501.

[45] [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36.

[46] *Id.*, at 990.

[47] [1990] 2 S.C.R. 1199, at 1224, [1990] S.C.J. No. 106.

> do so may, in some cases, involve an intrusion into budgetary considerations which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However such considerations are clearly relevant once a violation which does not survive s.1 has been clearly established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.
>
> Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money…. In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the scheme in question is clearly inappropriate.[48]

As indicated in *Martin*[49] the legitimacy of government expenditure control was recognized by the Supreme Court in *Egan v. Canada*.[50] In that case, the majority of the Supreme Court found the exclusion of same sex partners from the old age security regime violated section 15, but a differently constituted majority found that the exclusion was justified under Charter section 1. In reaching that conclusion, the Court accepted budgetary concerns as relevant to the determination of a pressing and substantial objective. Justice Sopinka explained why funding concerns should be considered in the section 1 analysis:

> It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of court proceedings under s. 15(1) of the *Charter*. The problem is identified by Professor Hogg in *Constitutional Law of Canada* (3rd ed. 1992), at pp. 911-12, where he states:
>
> > It seems likely that virtually any benefit programme could be held to be under-inclusive in some respect. The effect of *Schachter* and *Tétreault-Gadoury* is to subject benefit programmes to unpredictable potential liabilities. These decisions by-pass the normal processes by

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[48] [1992] 2 S.C.R. 679, at 709-10, [1992] S.C.J. No. 68.
[49] [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54.
[50] [1995] 2 S.C.R. 513, [1995] S.C.J. No. 43.

> which a government sets its priorities and obtains parliamentary approval of its estimates.
>
> This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so.[51]

This observation is undoubtedly correct. Governments must approach the creation of any new social benefit programs or affirmative action plans with great reluctance if courts ignore the reality of fiscal limitations. Faced with a choice of "all or nothing at all," governments concerned with mounting debt and deficit might well prefer the latter.

In *Eldridge v. British Columbia (Attorney General)*,[52] the Supreme Court was asked whether the provincial government's failure to provide sign language interpretation services for deaf persons was an unjustified violation of section 15 of the Charter. In its section 1 analysis, the Court emphasized that the estimated cost of providing sign language interpretation services in British Columbia was only approximately $150,000, and expressed doubt that its decision would lead to the proliferation of interpretation services for non-official linguistic minorities. These statements do indicate that the Supreme Court recognizes that at some point cost does matter. Justice La Forest, for a unanimous Court, explained that governments must have flexibility in allocating resources:

> The Court has also held that where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically…. It is also clear that while financial considerations alone may not justify *Charter* infringements…, governments must be afforded wide latitudes to determine the proper distribution of resources in society…. This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups.[53]

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[51] *Id.*, at paras. 104-105.
[52] [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86.
[53] *Id.*, at para. 85 [citations omitted, emphasis added].

V. CONCLUSION

In our view, the significance of constraints on government funding depends on the proper conception of the Charter. In her article in this volume, Professor Sheppard describes the different conceptions of equality ranging from classical liberalism/formal equality, to visions of substantive equality which "would challenge some of the fundamental economic and political pillars of modern society."[54] To the extent that courts move to the latter vision of equality which imposes a positive obligation on governments to reduce or eliminate all forms of social and economic inequality, the ability of government to rely on funding considerations as a "free standing pressing and substantial objective for the purposes of section 1 of the Charter" becomes essential. If courts take on a policy-making role, they must think and act like legislators and give serious consideration to the financial implications of their decisions.

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[54] C. Sheppard, "Inclusive Equality and New Forms of Social Governance" (2004) 24 Sup. Ct. L. Rev. (2d) 45.